

NO. 48522-2-II

**WASHINGTON STATE COURT OF APPEALS
DIVISION II**

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 925,
Appellant/Cross-Respondent,

v.

FREEDOM FOUNDATION,
Respondent/Cross-Appellant,

and

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,
Respondent.

**SUPPLEMENTAL BRIEF OF RESPONDENT
DEPARTMENT OF SOCIAL AND HEALTH SERVICES**

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I. INTRODUCTION

In the present case, the Freedom Foundation (Foundation) made a request for information about the license-exempt child care providers represented by Service Employees International Union, Local 925 (SEIU 925). This program is otherwise known as Family, Friends and Neighbors (FFN) child care. At issue in this appeal are the application of three provisions of the Public Records Act (PRA) and whether article I, section 7, of the Washington Constitution provides greater protection for personal privacy than the PRA. On April 27, 2016, this Court ordered supplemental briefing discussing the impact of its April 12, 2016 decision in *SEIU Healthcare 775NW v. Department of Social and Health Services*, Cause No 46797-6-II. In that case, the Foundation made a request to the Department of Social and Health Services (DSHS) for a list of home care providers, known as Individual Providers (IPs). This Court held that the records release was not restricted by the PRA's commercial purpose prohibition under RCW 42.56.070(9), nor were the records exempt as personal information under RCW 42.56.230(1). SEIU 925 also asserts these exemptions in this case. This Court's decision in *SEIU Healthcare 775NW* is binding.

II. ARGUMENT

A. Under the *SEIU Healthcare 775NW* Decision, the Public Records Act's Commercial Purpose Prohibition on the Release of Records Requires the Direct Use of a List to Generate Profit

As a matter of first impression, this Court held in *SEIU Healthcare 775NW* that the commercial purposes prohibition contained in RCW 42.56.070(9) requires an intent to generate direct profits from the use of a list. Slip Op. at 22. In reaching the conclusion that commercial purpose requires direct economic benefit, this Court engaged in a three-part analysis. This Court began with the PRA's overall purpose and objective: that the act be liberally construed with narrow exemptions so that people remain informed. Slip Op. at 18. The PRA favors disclosure, rendering RCW 42.56.070(9)'s prohibition on release similarly narrow. Slip Op. at 19.

This Court then turned to the ordinary meaning of the word "commercial." This Court held that "commercial" activities were not limited to sale transactions, but could encompass any activity involving profit, or generation of financial gain, as the primary aim. *Id.* In doing so, this Court relied upon 1975 and 1998 AGO opinions discussing commercial purposes. *Id.* at 20-21. The 1975 opinion concludes that commercial purpose encompasses any profit-expecting activity and is not limited to the buying and selling of goods.

1975 Op. Att’y Gen. No. 15, at 10. The 1998 opinion clarifies that commercial purpose is not limited to situations where individuals are directly contacted or personally affected. 1998 Op. Att’y Gen. No. 2. This Court combined these principles to reach its conclusion that commercial purpose includes any business activity intended to generate profits. Slip Op. at 21. Further, in light of the PRA’s overarching purpose to maximize release of records, this Court interpreted RCW 42.56.070(9) to require that the requester intended to use the records for *direct* profit. Slip Op. at 22. It is not enough that the records could give rise to indirect economic benefits, because such a definition would have the effect of blocking a wide range of records from release. *Id.*

The Foundation argued that as a nonprofit organization, it was necessarily excluded from the commercial purposes prohibition because it does not generate profits. This Court rejected such a categorical reading of the commercial purposes prohibition, noting that “even a nonprofit organization can generate revenue.” *Id.* Accordingly, a requester’s profit or nonprofit status is not dispositive. An agency must carry out an individualized determination of the requester’s purposes based on the identity of the requester, the nature of the records requested, and any other information available to the agency. *Id.* at 24. This Court did not specify the location, source, and extent of the “other information” an agency must

consider, other than to hold that a mere certification from the requester is not sufficient. *Id.* at 24, 25. When an agency has an obligation to investigate, it must at least require the requester to state the purpose of the request. *Id.* at 25. This Court did not indicate whether the duty to investigate arises only when there is some indication of commercial purpose, or also arises when the request is facially neutral and nothing about the request itself suggests a commercial or personal use (such as a request from an email address unfamiliar to the agency).

In *SEIU Healthcare 775NW*, this Court held that the Foundation's request did not meet the commercial purpose standard based on the facts presented. *Id.* at 27. This conclusion was predicated on the stated purpose of the request—to notify individuals of their constitutional rights—and on the Foundation's express declarations disavowing any intent to use the list to directly generate profits from the individuals identified on the list, or to redistribute the list to others. *Id.* *SEIU Healthcare 775NW* argued four additional theories for why the list should be enjoined as a commercial purpose: 1) the Foundation would use the list to economically injure *SEIU Healthcare 775NW*; 2) the Foundation's actions would increase its own membership and funds; 3) IPs being contacted by the Foundation would assist other commercial activities; and 4) the Foundation's actions would bring credit or attention to its own extreme political views.

Id. at 26-27. The *SEIU Healthcare 775NW* Court did not categorically reject these claims, but rather found insufficient explanation or facts to find that the commercial purposes exemption applied. *Id.*

B. The *SEIU Healthcare 775NW* Decision Affirms That Application of an Exemption is Within the Four Corners of the Record

Washington courts have consistently directed that when an agency determines whether an exemption applies, it looks to information within the four corners of the record. *Predisik v. Spokane Sch. Dist. No. 18*, 182 Wn.2d 896, 906, 346 P.3d 737 (2015); *Koenig v. City of Des Moines*, 158 Wn.2d 173, 187, 142 P.3d 162 (2006); *King Cnty. v. Sheehan*, 114 Wn. App. 325, 341, 57 P.3d 307 (2002). The *SEIU Healthcare 775NW* decision is in keeping with this precedent. Although this Court created a new duty for DSHS to investigate for commercial purposes, it remains the law that agencies are not empowered to “look beyond the four corners of the records at issue to determine whether they were properly withheld.” Slip op. at 29 (citing *Koenig*, 158 Wn.2d at 183).

DSHS followed this clearly established principle and found nothing within the four corners of the records at issue to suggest that RCW 42.56.230 prevented disclosure. *SEIU Healthcare 775 NW* argued that DSHS erred in doing so because the release of records would be “tantamount to the release of the identities of Medicaid beneficiaries” and

therefore exempt under RCW 42.56.230(1). Slip Op. at 28. This Court rejected that argument.

In prior cases such as *Koenig*, 158 Wn.2d at 181-82, and *Sheehan*, 114 Wn. App. at 344-45, it was argued that an exemption or prohibition may apply, notwithstanding the content of the requested record *itself*, if the record could be somehow used to derive protected information. Washington courts have consistently rejected such “linkage” arguments, and this Court did the same in the *SEIU Healthcare 775NW* decision. Slip Op. at 30. This Court followed the *Koenig* and *Sheehan* decisions in restricting its inquiry to the plain statutory language of the exemption claimed. Because the four corners of the records at issue did not match the “plain language of the statute,” RCW 42.56.230(1) did not apply to exempt the records from disclosure. *Id.*

In this case, the Foundation requested certain information that care providers under the FFN program are required to provide to DSHS, including their own legal name, address and telephone number. WAC 170-290-0135(1)(a). The Foundation did not request any information specifically identifying the child receiving care.

SEIU 925 asserts two additional PRA exemptions in this case: RCW 42.56.230(1), for information in files maintained for welfare recipients; and RCW 42.56.230(2)(a)(ii), for personal information of

children enrolled in a public child care program. SEIU 925 theorizes that because FFNs receive federal funds, any child receiving care by an FFN is a “welfare recipient” and therefore the lists at issue are protected. But SEIU 925 fails to show that the lists of care providers are maintained “for” the children receiving care. The records identify the care provider, not the child receiving care. They do not identify or pertain to the children and are not used directly in the care of the children. SEIU 925 asserts that the records provide a “virtual road map to the whereabouts of children entrusted to provider’s care.” App. Br. at 31. But the address of a child care provider will not always be the same as the address of the child. While friends and neighbors must provide care at the child’s address, family members providing care may do so at *either* the care provider’s address *or* the child’s address. WAC 170-290-0130(3), (4). The records do not identify whether the care providers at issue are family, friends or neighbors, nor where care is actually provided.

An agency must construe exemptions narrowly in favor of disclosure to achieve the PRA’s paramount purpose of open government. *Predisik*, 182 Wn.2d at 902. Consistent with *Koenig* and *Sheehan*, based on the information within the records, DSHS did not find RCW 42.56.230 applicable because the information requested was not linked to specific children. This Court’s decision in *SEIU Healthcare 775NW* confirms that

DSHS acted correctly by restricting its inquiry to the plain language of the statute and the four corners of the record.


III. CONCLUSION

Based on its understanding of the law at the time, DSHS found no basis to apply the exemption in RCW 42.56.070(9) in responding to the public records requests at issue here. Based on the four corners of the records requested here, DSHS concluded that the requested records are not exempt under RCW 42.56.230(1) or 42.56.230(2)(ii). This Court's decision in *SEIU Healthcare 775NW* supports both determinations.

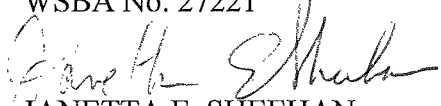
In responding to the public records request at issue here, DSHS found no statutory exemption that applied to the records and would have produced them to the requester had the agency not been enjoined from doing so. DSHS remains ready to produce the requested records at such time as it is permitted or directed to do so by the courts.

RESPECTFULLY SUBMITTED this 19th day of May, 2016.

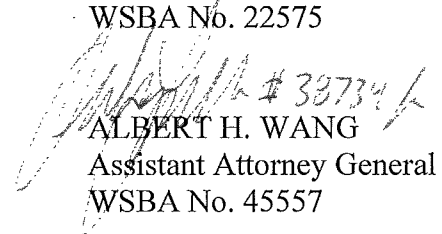
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CERTIFICATE OF
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I certify that I served a copy of the Respondent's Supplemental Brief and
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 19 day of May, 2016 at Olympia, WA.



JANE ROCKWELL

WASHINGTON STATE ATTORNEY GENERAL

May 19, 2016 - 3:18 PM

Transmittal Letter

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